Nos. 18-1451 and 18-1477

In The
Supreme Court of the United States

NATIONAL REVIEW, INC., *Petitioner,*

v.

MICHAEL E. MANN, *Respondent.*

COMPETITIVE ENTERPRISE INSTITUTE AND RAND SIMBERG, *Petitioners,*

v.

MICHAEL E. MANN, *Respondent.*

On Petitions For Writs Of Certiorari To The District of Columbia Court of Appeals

BRIEF OF CATO INSTITUTE, REASON FOUNDATION, AND THE INDIVIDUAL RIGHTS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

If an investigation has purportedly exonerated a controversial figure, is there an actionable defamation claim against someone who continues to criticize the controversial figure by questioning the quality and motivations of the investigation?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

The Individual Rights Foundation ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center, a nonprofit 501(c)(3) or-

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[1] Rule 37 statement: All parties were given timely notice and have consented to the filing of this brief. No party's counsel authored this brief in any part. No person other than *amici* made a monetary contribution to its preparation or submission.

ganization. IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and participates as *amicus curiae* in appellate cases to combat overreaching governmental activity that impairs individual rights.

This case concerns *amici* because it threatens to chill speech at the First Amendment's core. Amici's representatives—like many people who live and work in the District of Columbia—have frequently voiced their concerns and suspicions regarding public figures, including by rhetorical comparison to "notorious" persons.[2] In fact, one has compared plaintiff Michael Mann himself to a "[playground] tattle-tale who complains to the teacher that someone said mean things about him."[3] The court of appeals decision would radically expand liability for commentators engaging in sharp criticism of government actors—to the necessary detriment of free and open debate.

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[2] *See, e.g.*, Ilya Shapiro, *Eric Holder's Tenure*, Townhall, Sept. 28, 2014, http://bit.ly/2iQm6UJ ("One thing that differentiates Holder from other notorious attorneys general, like John Mitchell under Richard Nixon, is that Holder hasn't gone to jail (yet; the DOJ Inspector General better lock down computer systems lest Holder's electronic files 'disappear').").

[3] Trevor Burrus, *Hopefully Dr. Michael E. Mann Doesn't Sue Me for This Column*, Forbes, Aug. 14, 2014, http://bit.ly/2jfLUsu.

INTRODUCTION AND SUMMARY OF ARGUMENT

Is it defamation to call O.J. Simpson a murderer? Or, more specifically, is it defamation to call O.J. Simpson a murderer *because* he was acquitted in a court of law? If a blogger or commentator looked into the facts of the case and decided that, in his opinion, Simpson was in fact a murderer, how much weight should Simpson's acquittal be given in a defamation suit—i.e. that the blogger's opinion was a provably false statement of fact, that the Simpson's jury's acquittal was sufficient evidence of that, and that a jury could thus conclude it was defamation?

This case is little different than that hypothetical. A writer voiced his opinion on an embattled scientist's work and included over a dozen hyperlinks showing the evidence for his conclusions. But his conclusions were at odds with "official" commissions, and the court below gave those commissions undue weight: "The assertion that the CRU emails showed or revealed that Dr. Mann engaged in deception and academic and scientific misconduct is not simply a matter of opinion: *not only is it capable of being proved true or false, but the evidence of record is that it actually has been proved to be false by four separate investigations.*" *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1245 (D.C. 2016) (emphasis added).

That is now the law in the District of Columbia, the pulsing heart of our political discourse. Those who arrive at conclusions contrary to official reports or investigations are too easily subject to possible defamation suits. Do you disagree with the recent Mueller report and believe that someone in the recent election did in fact fraudulently collude with a

foreign government? Better lawyer up before you write an article citing the evidence for your conclusion. Or maybe you believe that the Warren Commission's investigation into the Kennedy assassination improperly exonerated a suspect. Better lawyer up before you publish anything.

This case sits in that oft-explored space between protected and unprotected speech. It can be sometimes difficult to determine the precise line between First Amendment-protected speech and fighting words (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)), incitement (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)), obscenity (*Roth v. United States*, 354 U.S. 476 (1957)), and defamation (*Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)), but this Court has "regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505 (1984). Here, the lower court did not adequately confine defamation to "acceptably narrow limits" in a case concerning an ongoing debate over a contentious political and scientific question.

The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "[A] principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to

anger.'" *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

The decision by the D.C. Court of Appeals threatens these principles. Defendant Rand Simberg engaged in a classic example of speech concerning public affairs: He criticized a high-profile academic (Dr. Michael Mann) whose work has been subject to intense criticism for suspected dishonesty. He lambasted various "investigations" by public and private bodies into those charges of academic dishonesty as inadequate, and he called for more investigation.

The court of appeals gave substantial, almost dispositive weight to investigations that were performed by "credentialed," "professional" persons and academics that had seemingly exonerated Dr. Mann to varying degrees. The court then concluded that calling for an "independent investigation" demonstrated that there were facts to be found and that a jury should, therefore, be tasked with wading through a contentious public debate to assess who, in fact, was correct. This holding gave insufficient concern for the First Amendment's protection of public debate and gave disproportionate significance to a thoroughly anodyne call for further investigation. Critiquing government investigations as inadequate—and calling for "independent" investigation of people engaged in high-stakes policy disputes—are ubiquitous in the current marketplace of political speech.

For good measure, the court radically expanded libel exposure by also concluding that defendants could face liability for using common pejoratives such as "deception" and "misconduct," and for comparing Dr. Mann to "notorious" figures. These rhetorical de-

vices are utterly commonplace and do not, in any event, constitute false statements of objective facts.

If this were the law anywhere in the country, it would represent a profound danger to free speech and debate. That this is the law in the District of Columbia is even worse. If allowed to stand, the decision will drastically curtail the free flow of critical speech from all directions.

ARGUMENT

I. DISAGREEMENT WITH OFFICIAL BODIES IS NOT EVIDENCE OF BAD FAITH

In holding that Dr. Mann could proceed on his defamation claims, the court below placed significant weight on various "investigations" of Mann's work in the academic and scientific communities, determining that their conclusions were essentially the final word. According to the panel, "Mr. Simberg would not have concluded [his] article with the prescription that a 'fresh, truly independent investigation' is necessary, unless he supposed that 'ordinary, reasonable readers could read the [article] as implying,' that Dr. Mann was guilty of misconduct that had to be ferreted out." 150 A.3d at 1250 (citation omitted).

But Simberg didn't just "imply" that Dr. Mann was "guilty of misconduct" that needed to be "ferreted out." He came right out and said it: he called Dr. Mann the "Jerry Sandusky of climate science" and accused Mann of having "molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and the planet." *Id.* at 1262. Similar statements are common in the marketplace of ideas. *See, e.g.*, David Egilman, Lerin Kol, et al., *Manipulated Data in Shell's Benzene Historical Exposure Study,* Int'l J. of Occupa-

tional and Envtl. Health, 13:2, 222–32, 222 (2007) ("A review of the raw data on which Shell and its consultants relied reveals that Shell manipulated and omitted data in order to reach conclusions that exculpated it from liability and helped delay stricter benzene regulation.").

Moreover, he wrote that the investigations themselves were flawed. The Penn State case, in particular, was a "cover-up" and a "whitewash" by a "rotten and corrupt" institution that was apparently willing to "hide academic and scientific misconduct." 150 A.3d at 1262–64. Simberg then criticized the National Science Foundation's investigation because it relied in large part on information provided by the university, and thus was "not truly independent." *Id.* at 1263. Accordingly, in Simberg's view, it was "time for a fresh, truly independent investigation." *Id.* at 1264.

Few people who read Mr. Simberg's article would regard it as significantly different than our normal, everyday political discourse. Yet in the appellate court's view, Simberg's questioning of the investigations authorized a jury to essentially referee the dispute between Mann and Simberg. As the court said, Simberg's claim that "Dr. Mann engaged in deception and academic and scientific misconduct . . . actually has been proved to be false by four separate investigations." *Id.* at 1245.

In reaching this conclusion, the court deferred to the supposed eminence of the official bodies behind the investigations, expressing bafflement as to "how [the defendants] came to have such beliefs in light of the reports that had been issued." *Id.* at 1255 n.57. "We are struck by the number, extent, and specificity of the investigations, and by the composition of the

investigatory bodies. . . . Although we do not comment on the weight to be given to the various investigations and reports,[4] . . . what is evident from our review is that they were conducted by credentialed academics and professionals." *Id.* at 1253.

The court's deference to the pronouncements of these bodies defies foundational First Amendment principles and encourages future courts to call on juries to referee public debates over important matters, at least as long as some "credible" investigation is invoked and questioned. That result will greatly chill public discourse on important and contentious issues.

A. Disagreeing with an Investigation's Conclusions and Arguing that Someone Has Not in Fact Been Exonerated by an Inquiry Is Core—and Utterly Commonplace—Political Speech

In calling for a "fresh, truly independent investigation," Simberg engaged in core political speech: He criticized not only a public figure whose scientific work had been held up as the basis for massive policy changes, but also public institutions for conducting inadequate investigations into serious charges of academic misconduct arising from the infamous "hide the decline" and "trick" emails exposed in the "ClimateGate" scandal.[5] The appellate court disagreed

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[4] An odd comment from a court that obviously gave great weight to the various investigations and reports.

[5] The court of appeals recounted that the investigations concluded that a reference to Dr. Mann's "trick" in one of the most publicized emails was merely a "colloquialism" and didn't refer to a "deception, but rather to the best way of doing or dealing with something' . . . ." 150 A.3d at 1223 n.9. This sort of investigative "exoneration" (by the University of East Anglia, where

with Mr. Simberg about the quality of the investigations. They were "struck by the number, extent, and specificity of the investigations, and by the composition of the investigatory bodies." 150 A.3d at 1253.

The court below was so impressed with the NSF report that it outright characterized Mr. Simberg's article as "inaccurate." *Id.* at 1246. Mr. Simberg claimed that the NSF report couldn't be trusted because it "relied on the integrity of [Penn State] to provide them with all relevant material." *Id.* But, the court argued, the NSF not only "fully review[ed] all the reports and documentation the University provided," but also investigated other sources. *Id.* Yet both of these statements can be true. The NSF could have "review[ed] reports and documentation the University provided," and the university could have failed to "provide them with all relevant material." Did the university provide the NSF with "reports and documentation" that were colored by the university's self-interest, as Mr. Simberg argues? To many fair-minded observers, the answer would be "perhaps." To the court of appeals, however, Mr. Simberg's view was simply "inaccurate."

If the judges of the court of appeals and Mr. Simberg met in a bar, they could have a spirited debate about the quality of the investigations. The judges are certainly free to have their own opinions on the matter. Yet, in a defamation suit concerning matters of public debate, juries should not be asked to resolve such questions because judges find certain investiga-

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the Director of its Climate Research Unit sent the very email in question) cries out for further examination.

tions convincing. If public debate is to be robust and wide open, the First Amendment requires more.

Consider how the court's decision here might apply to the reaction over the Mueller report regarding the Special Counsel's investigation into Russian interference in the 2016 presidential election. Robert Mueller is a highly "credentialed" former Director of the FBI who led a team of other "professionals" in reviewing claims that the 2016 Trump campaign "colluded" with the Russian government. After interviewing approximately 500 people and issuing more than 2,800 subpoenas, the Special Counsel's "investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities." Special Counsel Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election: Vol. I of II* 2, U.S. Dep't of Justice (Mar. 2019).

Under the appellate court's view of the world, that pronouncement might be the end of the story about whether there was "collusion" between the Trump campaign and the Russians, and any other view is "inaccurate." Anyone who disagrees with the conclusions could thus face a defamation claim if he argues that someone mentioned in the report is not in fact exonerated. Hopefully, the plaintiff bringing the defamation suit finds a judge who is as impressed with the quality of the Mueller report as the lower court judges were impressed with the investigations into Dr. Mann. Subjective commentary and conjecture would then become potentially defamatory and further commentary about the Mueller report would be chilled.

Yes, a jury could conclude that the Mueller report in fact exonerated our hypothetical plaintiff, but a jury could conclude almost anything. Playing gatekeeper to the jury is a vital role for judges in defamation suits. Jury trials encourage settlements, and when judges open the courthouse doors to defamation suits for subjective commentary and interpretation, speakers and writers will be chilled from disagreeing with official investigations and inquiries that have purportedly exonerated embattled figures, especially in Washington.

And that happens all the time. One leading critic of the president immediately rejected the conclusion and called for more investigation:

> "Undoubtedly there is collusion," [Congressman Adam] Schiff said in an interview this week, after Attorney General William P. Barr submitted a four-page letter to Congress summarizing key aspects of Mueller's report. "We will continue to investigate the counterintelligence issues. That is, is the president or people around him compromised in any way by a hostile foreign power?"[6]

The title of another article summarized exactly how investigations (no matter how "credentialed" the investigators) are received in high-profile public policy matters. E.J. Dionne, *Mueller's Report Is the Begin-*

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[6] Karoun Demirjian, *'Undoubtedly There Is collusion': Trump Antagonist Adam Schiff Doubles Down after Mueller Finds No Conspiracy*, Wash. Post, Mar. 26, 2019, https://wapo.st/2LAhwuk.

ning, Not the End, Wash. Post, Apr. 18, 2019, https://wapo.st/2Di1GiX.

Indeed, aside from this bellwether example, how much daily commentary and investigative journalism produced in D.C. has been swept into the realm of actionable libel by the appellate court's approach? Disagreeing with investigations and implying or saying that there has in fact been misconduct is now so common that the court's rule could sweep up a large amount of important speech on public matters.

Simberg and Mark Steyn (the columnist at issue in No. 18-1477) are hardly the first to voice disagreement with an official exoneration. Oliver North was found not guilty by a court of law, but a former president still calls him a "criminal."[7] George Zimmerman and O.J. Simpson were likewise acquitted, but those who find fault with their trials still call them murderers.[8] Despite a lack of prosecution, commentators have called for Presidents George W. Bush and Barack Obama to be tried for "war crimes,"[9] and predicted that the Director of National

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[7] *Jimmy Carter: I Don't Pay Any Attention to Oliver North; He Was a Criminal*, CNN.com, March 28, 2014, http://cnn.it/1i2va0N.

[8] Etan Thomas, *George Zimmerman Is Not a Celebrity, He Is a Murderer*, Huffington Post, Jan. 31, 2014, http://huff.to/2j30YdC; Vincent Bugliosi, Outrage: The Five Reasons Why O.J. Simpson Got Away With Murder (1996).

[9] Rebecca Gordon, *They Should All be Tried: George W. Bush, Dick Cheney, and America's Overlooked War Crimes*, Salon, Apr. 30, 2016, http://bit.ly/2iQdZcV; Jordan Fabian, *Nader: Impeach Obama for 'War Crimes'*, The Hill, March 20, 2011, http://bit.ly/2iqkjo8.

Intelligence "will get away with perjury."[10] No charges were filed against a recent presidential candidate after a lengthy investigation that reached the highest level of the FBI. Is it now *per se* bad faith to nonetheless assert that she is "unquestionably guilty"?[11] And, finally, would the appellate court have found it actionable libel to say "Lizzie Borden took an axe and gave her mother forty whacks" given that Borden was acquitted? Sarah Miller, The Borden Murders: Lizzie Borden and the Trial of the Century (2016).

B. Academic, Professional, and Government Boards—No Matter How "Credentialed" Their Members—Cannot Be Turned into Truth Commissions

The National Science Foundation, which authored one of the reports at issue, is an eminent institution, much like our justice system. In the proceedings below, Mann described it as "essentially the final arbiter of scientific research in the United States,"[12] a view the court appeared to accept wholesale. But it is precisely because so many official bodies can lay claim to being the "final arbiter" in their respective spheres that the decision below is so dangerous. Challenging the conclusions of an investigation could

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[10] Paul Campos, *How James Clapper Will Get Away with Perjury*, Salon, June 12, 2013, http://bit.ly/19QgJye.

[11] Daniel Payne, *Sorry, Mark Cuban: Hillary Clinton is Unquestionably Guilty*, The Federalist, Sept. 6, 2016, http://bit.ly/2iVDSZm.

[12] Plaintiff's Consolidated Memo. of Points and Authorities in Opposition to Defendants Competitive Enterprise Institute and Rand Simberg's Special Motion to Dismiss at p. 27, Mann v. Nat'l Review, Inc., D.C. Super. Ct. Case No. 2012 CA 008263 B, (Jan. 18, 2013), online at https://bit.ly/2FQZrVb.

not only waive a speaker's actual malice protection but would effectively make each such body a *de facto* truth commission, safe in the knowledge that disagreeing with its findings and questioning an exoneration is not something to be decided in the marketplace of ideas but rather by a jury.

That result should be feared by those on *all* sides of the political spectrum since those bodies which have the most official authority will often change their views with the changing fortunes of our political parties. For example, President Trump once met with vaccine skeptic Robert F. Kennedy, Jr. and has said he would consider creating a commission to investigate vaccine safety.[13] If such a commission were formed, would its report be regarded as the "final arbiter" of the possible vaccine-autism connection, and would accusing vaccine skeptics of "fraud" or "misconduct" then become actionable libel?

Everyday experience demonstrates the uncertainty and shifting nature of scientific conclusions—where consensus at any point in time is invariably backed by "credentialed academics and professionals." For example, before the advent of antipsychotic drugs, the lobotomy and other methods of invasive psychosurgery were used to treat mental disorders in the 1930s and '40s, peaking with Egas Moniz's receipt of the 1940 Nobel Prize in Medicine or Physiology—an eminent award given out by an eminent body.[14] The American Psychiatric Association—an

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[13] Keith Kloor, *Robert F. Kennedy Jr. Takes His Debunked Vaccine Concerns to Trump*, Newsweek, Jan. 11, 2017, http://bit.ly/2jfYiME.

[14] George A. Mashour et al., *Pyschosurgery: Past, Present, and Future*, 48 Brain Research Reviews 409, 411-12 (2005).

organization full of credentialed academics and professionals—listed homosexuality as a mental disorder in its Diagnostic and Statistical Manual of Mental Disorders (DSM-II) until 1973.[15]

And we have seen the often-pernicious result of courts imbuing prevailing socio-scientific views with the force of law. In the most notorious instance of scientific debate invading the courtroom, John Thomas Scopes was convicted of teaching the theory of evolution. Two years later, relying on the "science" of eugenics, Justice Holmes told us that "[t]hree generations of imbeciles are enough." *Buck v. Bell*, 274 U.S. 200, 207 (1927). And that's not all. *See*, *e.g.*, *Muller v. Oregon*, 208 U.S. 412, 421 (1908) ("[H]istory discloses the fact that woman has always been dependent upon man."); *People v. Hall*, 4 Cal. 399, 404–05 (Cal. 1854) (upholding prohibition on Chinese testifying against white people because the Chinese were "a race of people whom nature has marked as inferior" and who are "incapable of progress or intellectual development beyond a certain point"); *Scott v. State*, 39 Ga. 321, 323 (Ga. 1869) (interracial marriage is "unnatural" and "always productive of deplorable results"; "the offspring of these unnatural connections are generally sickly and effeminate"); *see also Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

Eugenics and racially motivated "science" were very much in vogue during the first few decades of the twentieth century. *See, generally*, Daniel Okrent, The Guarded Gate: Bigotry, Eugenics and the Law

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[15] Rick Mayes and Allan V. Horwitz, *DSM-III and the Revolution in the Classification of Mental Illness*, 41 J. of Hist. of Behavioral Sciences 249, 258-59 (2005).

That Kept Two Generations of Jews, Italians, and Other European Immigrants Out of America (2019). And, in 1907, there was an official commission, the U.S. Congress Joint Immigration Commission (known as the Dillingham Commission), that "employed a lengthy roster of recognized scientists and other experts" to investigate the question of the effect of immigration by "undesirables." *Id.* at 152. One of the commission's exhibits was the *Dictionary of Race and Peoples*, compiled by Daniel Folkmar. "Starting from a premise that stressed the stability of racial differences across the centuries, Folkmar somehow identified six hundred distinct racial and ethnic strains." *Id.* at 153.

Imagine a contemporary writer looked into Folkmar's research and claimed it was the product of "scientific misconduct" or "data manipulation" or even data "molestation" (as it was). In the resulting defamation suit brought by Folkmar, the court, just as the court did here here, cites the inclusion of Folkmar's book in the august Dillingham Commission's report as a demonstration of the book's scientific accuracy, and then characterizes the critic's view as "inaccurate." The case goes to the jury, and criticism of eugenics is significantly chilled just in time for Carrie Buck to go under the knife.

Courts should not meddle in such scientific debates. As the second Justice Harlan observed:

> In many areas which are at the center of public debate "truth" is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is "true" may effectively institute a system of censorship.

> Any nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity. The marketplace of ideas where it functions still remains the best testing ground for truth.

Time Inc. v. Hill, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part).

Under the appellate court's rule, those who agree with "final arbiters" today may find themselves unable to criticize their conclusions in the future once the new makeup of our national institutions has made their views no longer "politically correct."[16]

C. Déjà Vu: The Panel Decision Echoes the Corrosive Stifling of Dissent in the Dreyfus Affair

The libel trial of Émile Zola was one of the low points in the history of free speech. In his open letter *J'accuse…!*, Zola had accused a French military tribunal of corruptly exonerating an army officer of treason in order to cover up the wrongful conviction of Alfred Dreyfus for the same crime. During his trial, Zola's defense was repeatedly prevented from asserting any good-faith disagreement with Dreyfus's trial. Instead, they were forced to operate under the legal fiction that no skepticism of a duly completed judicial proceeding could even be entertained:

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[16] The term originated in reference to the beliefs endorsed at any moment by the Soviet Communist Party, which were therefore, by definition, "correct" (until they weren't). *Politically Correct*, in William Safire, Safire's Political Dictionary (2008).

> The Judge: I repeat that no question will be put which would be a means of arriving at the revision of a case sovereignly judged.
>
> M. Clemenceau: Then the court will put no question concerning good faith?
>
> The Judge: Concerning anything that relates to the Dreyfus case. No. Offer your motions. I repeat that I will not put the question.
>
> M. Labori: Will you permit me, *Monsieur le Président*, in our common interest, to ask you, then, what practical means you see by which we may ascertain the truth?
>
> The Judge: That does not concern me.

The Trial of Émile Zola 35–36 (Benjamin R. Tucker, ed., 1898).

The panel's decision here would create a similar legal regime in the United States. Rand Simberg and Mark Steyn have asserted a good-faith disagreement with the findings of several commissions, each assembled to investigate claims of misconduct against Dr. Michael Mann. The clear implication of the appellate court's decision, however, is that anyone in their right mind should have been awed at the assortment of titles and degrees these commissions had collected. Such obvious and unimpeachable authority, in the panel's view, lends itself to a new *res ipsa loquitur* proof of actual malice: some commissions are so eminent, some institutions are so established, and some personnel are so qualified, that the simple act

of voicing dissent with their views may itself be taken as sufficient evidence of bad faith.

The defendants have indeed refused to accept the findings of these official reports. As Zola's prosecutor put it—anticipating the decision below by over 100 years—they have "done nothing here but open an audacious discussion on the thing judged." Trial of Émile Zola, *supra*, at 254. But they could have been forgiven for thinking their dissent was fully protected by the First Amendment's actual malice standard.

II. COMMONPLACE PEJORATIVE TERMS AND ANALOGIES TO "NOTORIOUS" PERSONS CANNOT BE ACTIONABLE FOR DEFAMATION

The court of appeals also found that Simberg faced potential liability from the use of words such as "deception" and "misconduct," in part because they were not accompanied by "language normally used to convey an opinion, such as 'in my view' or 'in my opinion,' or 'I think.'" 150 A.3d at 1245.

Setting aside that the First Amendment does not require magic words to claim its protection for subjective commentary, the opinion is wholly out of touch with the nature of modern commentary. Senators will now have to watch what they say in political debates (away from the Senate floor)—describing the policy of a political opponent as a "massive consumer fraud" will likely be actionable.[17] Likewise, the former governor of California might well be hauled into court for accusing an FBI director of a "gross viola-

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[17] M.D. Kittle, *Ron Johnson: 'Obamacare Is a Massive Consumer Fraud'*, Wisc. Watchdog, Sept. 16, 2016, http://bit.ly/2d4p7R9.

tion of professional responsibility."[18] But these are just the tip of the iceberg: in recent years politicians have referred to a public official's policy decision as "treasonous" and accused critics of "blood libel," far harsher terms than any used by Simberg and Steyn.[19]

According to the appellate court, comparing Dr. Mann to "notorious persons" is likewise enough to make a statement actionable.[20] 150 A.3d at 1247. How will this new rule change the terms of debate in "this town"? For one thing, opponents of the gun lobby will have to take their passion down a notch because, in the words of one columnist, "the only difference between [NRA Executive Director Wayne] LaPierre and, say, Timothy McVeigh, or Charles

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[18] Carla Marinucci, *Brown: FBI Director Comey Guilty of 'Gross Violation of Professional Responsibility'*, Politico, Oct. 31, 2016, http://politi.co/2jfpabU.

[19] Chris McGreal, *Rick Perry Attacks Ben Bernanke's 'Treasonous' Federal Reserve Strategy*, Guardian, Aug. 16, 2011, http://bit.ly/2iQb4AU; Jennifer Epstein, *Palin Charges Critics with 'Blood Libel'*, Politico, Jan. 12, 2011, http://politi.co/2iVo7RT.

[20] This, of course, runs counter to foundational First Amendment principles. "The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of . . . those public figures who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'" *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 51 (1988). And this manner of vitriolic comparison is precisely the type of "vehement, caustic, and sometimes unpleasantly sharp attack[]," *id.* at 51, that this Court has long recognized is part of the bargain in public debate.

Manson, for that matter, is a good tailor."[21] Debating which presidential candidate to "pin the Stalin moustache" on could likewise be a costly choice for pundits,[22] and Bill Moyers might have to compensate Mitch McConnell for describing Republicans as "stalking" Obamacare "like Jack the Ripper."[23] Even art critics will have to change their style. After this decision, who could have the confidence to start a magazine article with a sentence like "Le Corbusier was to architecture what Pol Pot was to social reform"?[24]

Political thinkers would certainly like to believe that historical analogies are integral to expressing their views on important political choices. A former presidential candidate, now president, was consistently compared to Hitler,[25] Hitler,[26] Hitler,[27] Hitler,[28]

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[21] John Young, *Trump Enlists the Trigger-Finger Fringe*, Austin American-Statesman, Aug. 17, 2016, http://atxne.ws/2j4uvni.

[22] Daniel Oliver, *We Should Pin the Stalin Moustache on Hillary, Not Trump*, The Federalist, July 14, 2016, http://bit.ly/29EZ26k.

[23] Matt Wilstein, *PBS' Bill Moyers: GOP 'Stalked' Obamacare Like 'Jack the Ripper'*, Mediaite, Nov. 2, 2013, http://bit.ly/2iq6juR.

[24] Theodore Dalrymple, *The Architect as Totalitarian*, City Journal, Autumn 2009, http://bit.ly/2iQVCSV.

[25] Peter Ross Range, *The Theory of Political Leadership that Donald Trump Shares with Adolf Hitler*, Wash. Post, July 25, 2016, http://wapo.st/2i4jrYS.

[26] Jonathan Chait, *How Hitler's Rise to Power Explains Why Republicans Accept Donald Trump*, N.Y. Mag., July 7, 2016, http://nym.ag/29vwVaY.

[27] Leonard Pitts, Jr., *If It Talks Like a Hitler and Walks Like a Hitler…*, Miami Herald, June 17, 2016, http://hrld.us/2iTTYm8.

and Mussolini.[29] Indeed, then-candidate Trump was so annoyed by this criticism that he threatened to "open up the libel laws" to prevent such speech in the future.[30] Luckily for him, the panel's decision has done this work for him.

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[28] Yannik Thiem, *Fascism in America: Donald Trump, America's Hitler of the 21st Century?*, APA Blog, Oct. 20, 2016, http://bit.ly/2j3dWuT.

[29] Fedja Buric, *Trump's Not Hitler, He's Mussolini*, Salon, Mar. 11, 2016, http://bit.ly/24VG177.

[30] Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, Politico, Feb. 26, 2016, http://politi.co/1QC9BDZ.

CONCLUSION

For these reasons, and those stated by the petitioners, the Court should grant the cert. petitions.

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